The other contention advanced on behalf of the plaintiff is that, assuming the defendant was not precluded from relying on the doctrine of tenancy by estoppel, he cannot be estopped from saying that he could not by law create a tenancy. I understand counsel's argument to be that the doctrine of tenancy by estoppel cannot apply to a case such as this where the grantor had himself no estate or interest in the land and so could not in law create a tenancy but in my opinion the short answer to it is that in such a case the doctrine does apply and that the law is that in such a case the grantor notwithstanding he had no estate or interest in the land is estopped by intendment of law from denying that he had created a tenancy.

For all these reasons, therefore, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; S. C. Goho & Co.*

YEOH BAH KOW v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) December 31, 1959]

[Penang — Criminal Appeal No. 35 of 1959]

Criminal Law and Procedure — Criminal Breach of Trust — Penal Code, s.408 — Charge — Essence of — No rebuttal of accused's testimonial.

The very essence of a charge of criminal breach of trust is that the offender, being entrusted with moneys belonging to another person, has converted such moneys to his own use.

Where there is no adequate or proper evidence rebutting an accused's testimony as to the manner in which he spent the moneys in the course of the business, and establishing that he had converted those moneys, which formed the subject matter of the charge, to his own private use, a conviction thereon cannot be supported.

CRIMINAL APPEAL.

A. Jayadeva for the appellant.

L. A. Massie (Deputy Public Prosecutor) for the respondent.

Rigby J.: This was an appeal from a decision of the learned President of the Sessions Court, sitting in Penang, whereby the appellant was convicted of criminal breach of trust, contrary to section 408 of the Penal Code, and sentenced to eighteen months' imprisonment.

The particulars of the charge upon which he was convicted were that he "between the 1st day of May, 1959, and 27th day of August, 1959, at No. 7, Weld Quay, Penang, being a manager in the employment of Ahmad bin Haji Jamal, the proprietor of Penang Travels, Penang, and in such capacity, being entrusted with certain property, to wit, cash and cheque deposits, amounting to $6,503.80 did commit criminal breach of trust in respect of the said property".

During the hearing of the appeal Mr. Massie, Deputy Public Prosecutor, intimated to the Court that for reasons to which I will later refer he did not feel that he cou'd support the conviction.

I accordingly allowed the appeal and quashed the conviction and sentence.

The facts of the case were briefly as follows: On or about the beginning of May, 1959, the complainant, as the result of representation made to him by the appellant, commenced a business known as Penang Travels, and appointed the appellant as Manager thereof. The business, in its inception, was financed by the complainant. From its early stages the business appears to have been run in a thoroughly unsatisfactory manner. For example, cash deposits were received by the appellant, as Manager, from various members of the public, as deposits for tours to Japan and other foreign countries. Nothing appeared to be done by the appellant to implement these bookings, with the result that the complainant himself was compelled to refund these fees to the dissatisfied and irate customers on various dates towards the end of August. Let it be said at once, however, that the two receipt books produced in evidence during the hearing of the case established that these deposits had, in fact, been paid over by the appellant to the complainant and actually received by the latter. He was, therefore, only repaying to the dissatisfied customers moneys that he had received, but in respect of which no action had been taken by the appellant, as Manager of the business, to implement the undertakings he had given to the customers. However, on the 27th August, in consequence of the complaints made to him, the complainant himself made a report to the Police, as a result of which these proceedings were instituted.

The complainant, Ahmad bin Haji Jamal, is himself the cashier of the Federal Transport Company, Butterworth. In that capacity he is, of course, a man used to handling and recording of accounts. Although the business of Penang Travels commenced on the 1st May it was not registered until the 15th September — after these proceedings had started. No separate banking account was opened by the complainant in the name of Penang Travels, and such cheques as he received from the appellant arising out of the business, he put into his own bank account. But the most remarkable feature of his evidence was that on his own admission he had no idea of the moneys he had advanced to the appellant to start the business. According to his evidence — and it seems incredible that it should be so — he had kept no accounts of such moneys as he had advanced and he relied entirely for that figure on the appellant's own statement. The sole evidence as to the moneys the appellant had received from the complainant consisted of a receipt — Ex. P. 24 — dated 24th August, 1959, and signed by the appellant. It is worded as follows:—

"PENANG TRAVELS
(Transportation Arranged)
LAND - SEA - AIR.
Local, Malayan & Foreign Tours.

24th August, 1959.

Received from Mr. Ahmad bin Haji Jamal, Proprietor, Penang Travels, Penang, the sum of Dollars Fifteen Thousand, and Fifty-nine and cents Eighteen ($15,059.18)

only, being capital in establishing Penang Travels. The total amount is made up of various sums during the period 1st May — 24th August, 1959.

PENANG TRAVELS.

(Signed) Robert Yeoh Bah Kow,
Manager."

The complainant, in evidence, stated:—

"P. 24 was typed out by accused. He knew the amount received by him. He has his own accounts. Accused himself told me the amount spent as capital. I did not go into the account with accused. I accept the amount in P. 24 as correct."

The appellant's defence was that of the moneys he received in the course of the business part he handed over to the complainant and part he retained for the general running of the business. Two receipt books were produced in evidence — Exs. P. 20 and P. 21. The receipt book, Ex. P. 21, contained receipts for moneys to a total sum of $1,886.50. These receipts are all signed by the complainant. The second receipt book, Ex. P. 20, contained receipts for moneys to a total sum of $7,651. A small proportion of the amounts received as shown in Ex. P. 21 are also shown in Ex. P. 20. The case for the prosecution was that the appellant kept two receipt books. Ex. P. 21 showed the moneys received by him in the course of the management of the business and which he had paid over to the complainant. It was said, however, that Ex. P. 20 was a "secret" receipt book showing the total amount he had received in the course of the management of the business. The appellant when asked to produce the amount he had received, as disc'osed in Ex. P. 20, was unable to do so. Hence the charge against him — that he had committed criminal breach of trust of what was, in fact, the difference in cash disclosed by the discrepancy between the two receipt books.

The explanation given by the appellant at his trial as to why he had kept two receipt books was that in the first book, Ex. P. 20, he kept the total amount of all the moneys he had received in the course of the business. In the second book, Ex. P. 21, he recorded the items he had paid over directly to the complainant. The balance of the moneys as shown in Ex. P. 20, he had used in the general running of the business. In the course of his evidence the appe'lant gave details as to how these moneys had been expended.

In the course of his judgment the learned President stated:—

"The sums shown in Ex. P. 20 and Ex. P. 21 have no connection with the $15,059.18 which was spent as capital for the formation of the Company".

With respect to the learned President, this finding of fact is contrary to the evidence. The complainant himself had no idea how much money he had advanced to the appellant for the formation of the Company and, according to his evidence, had no accounts of such advances. The figure of $15,059.18 advanced as capital was the appellant's own figure — a figure which the complainant accepted as correct. But it was the appellant's case throughout — and the receipt, Ex. P. 24 supports it — that that sum did not consist of specific advances in cash by the complainant at any one time, but also inc'uded the total sums of money collected by the appellant in the course of the management of the business. The receipt itself expressly states that the amount was made up of "various sums during the period 1st May — 24th August, 1959". To describe it as "capital advanced for the formation of the Company" was, indeed, a complete misnomer.

The explanation given by the appellant as to the manner in which, and the details upon which, he spent the moneys shown in the receipt book, Ex. P. 20, in the course of the management and conduct of the business, was virtually uncontradicted. The appellant may well have managed the business in a thoroughly reckless, incompetent and inordinately extravagant manner — and in a manner in which he may, perhaps, be accountable to the complainant in civil proceedings. But the very essence of a charge of criminal breach of trust is that the offender, being entrusted with moneys belonging to another person, has converted such moneys to his own use. Having regard to the appellant's own evidence there was, in my view, no adequate or proper evidence rebutting his own testimony as to the manner in which he had spent the moneys in the course of the business, and establishing that he had converted these moneys, which formed the subject matter of the charge, to his own private use. The learned Deputy Public Prosecutor, as I have said, intimated at an early stage of the appeal that in the circumstances of the case he could not properly support the conviction.

It was for these reasons that I allowed the appeal, and quashed the conviction and sentence.

Appeal allowed.

Solicitors: *Jayadeva & Zahir.*

MOHAMED v. HO WAI

[O. C. J. (Adams J.) January 21, 1960]

[K. L. — Civil Suit No. 152 of 1959]

Landlord and tenant — Tenancy contract — Vacation of premises on order under Emergency Regulations — Failure of tenant to pay rent or communicate with landlord — Whether abandonment of tenancy — Landlord taking possession without terminating tenancy — Frustration of leases — Claim for specific performance — Specific Relief (Malay States) Ordinance, 1950, s.11.

In this case the plaintiff prayed for specific performance of an agreement to grant a monthly tenancy. The facts which gave rise to the claim were shortly as follows: The plaintiff's uncle obtained a monthly tenancy of the premises in question in 1929. In 1951 the Mentri Besar acting under the Emergency Regulations ordered all persons living in the area to remove themselves to a resettlement area and the tenant thereupon had to vacate the premises in compliance with the order which had been served upon him. From that moment he ceased to pay any rent and made no attempt to communicate with the defendant, his landlady, nor did the defendant demand any rent from him as she did not know his whereabouts.

The area was made a "White Area" in August 1957 and the plaintiff requested permission from the proper

authority to re-occupy the premises (at that time he was not a partner of his uncle) and the permission was granted to him about a year later. In the meantime, however, the defendant who had taken the silence of the tenant, his failure to pay rent, and the fact that she had no idea of his whereabouts, as an intention to abandon the tenancy of the premises moved in and took possession thereof.

The plaintiff, in the meantime, was taken in as a partner of his uncle's business, and having been created an attorney of his uncle started these proceedings.

Held: (1) specific performance will only be granted in the discretion of the Court in the case of executory contracts. In this case the contract was an executed contract;

(2) on the service of the Order of the Mentri Besar the tenant abandoned the monthly tenancy and the defendant repossessed herself of her lawful property as soon as she was able to do so on the revocation of the Order because the intention of the tenant in abandoning the tenancy without in any way attempting to communicate with his landlady or her agent clearly indicated that he intended to terminate the tenancy.

Cases referred to:—

(1) *Alagappa Chettiar* v. *Kader & Ors.* [1939] M.L.J. 304; [1939] F.M.S.L.R. 145; [1938] F.M.S.L.R. 209.
(2) *Whitehall Court Ltd.* v. *Ettlinger* [1920] 1 K.B. 680.
(3) *Matthey* v. *Curling* [1922] 2 A.C. 180.
(4) *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.* [1945] A.C. 221.
(5) *London and Northern Estates Co.* v. *Schlesinger* [1916] 1 K.B. 20.
(6) *Pelepah Valley (Johore) Rubber Estates Ltd.* v. *Sungei Besi Mines Ltd.* [1954] M.L.J. 241.
(7) *Abdul Kadir* v. *Shaw Bros.* [1940] M.L.J. 270.

ACTION.

Morris Edgar for the plaintiff.
L. P. Thean for the defendant.

Cur. Adv. Vult.

Adams J.: The facts in this case are not in dispute and can be conveniently summarised as follows: The present plaintiff's uncle one Muhammadu s/o Kunjiammadu who is the owner of No. 4, Main Road, Sungei Way, on or about the 12th September, 1929 obtained by means of an oral agreement with the defendant's predecessor in title a monthly tenancy of No. 3, Main Road, Sungei Way at a monthly rental of $22.50. He carried on, in the two premises, that is to say, Nos. 3 and 4, Main Road, Sungei Way, the business of a provision merchant and coffee shop. In the year 1948 the title of the premises No. 3, Main Road, Sungei Way devolved on the defendant by an operation of law with which this case is not concerned and the rents were collected from the tenant by an agent of the defendant. The plaintiff himself had come to Malaya to help his uncle in 1930 and the business of provision merchants and coffee shop was carried on Nos. 3 and 4, Main Road, until October 1951. At that time the present plaintiff was in India. On the 17th October, 1951 the Mentri Besar, Selangor ordered all the persons living in the block of 13 shop houses on the Main Road, Sungei Way under the powers conferred upon him by the Emergency Regulations 17(f) to remove themselves to the Sungei Way Resettlement Area and the tenant thereupon had to vacate not only his own premises No. 4, Main Road, Sungei Way but those occupied on the monthly tenancy, namely, No. 3, Main Road, Sungei Way, in compliance with the order of the Mentri Besar which had been served upon him. From that moment the tenant ceased to pay any rent. He made no attempt to communicate with the defendant, his landlady, nor did the defendant demand any rent from him. Indeed she says that she did not know where he was.

The area was made a "White Area" on the 1st of August, 1957 and apparently the plaintiff requested permission from the proper authority to re-occupy the premises Nos. 3 and 4, Main Road, Sungei Way. It will be noted that he was not a partner of his uncle at this time. On the 8th September, 1958 he received a letter of permission from the District Officer, Klang. In the meantime, however, the defendant who had taken the silence of the tenant, his failure to pay any rent, and the fact she had no idea of his whereabouts, as an intention to abandon the tenancy of the premises moved in and took possession of the premises. She commenced to carry out the extensive repair works that were necessary to put the building into a habitable condition at a cost of over $2,000. The plaintiff who knew the defendant's address instructed his solicitors to write to the defendant on 12th November, 1958 demanding that he be permitted to return to the said premises and to this letter defendant's solicitors replied refusing to accede to the request. The plaintiff had been taken in as a partner in the business on the 10th October, 1958, having been created the attorney of the tenant by a Power of Attorney made and executed in the Republic of India on the 11th September 1958 registered as No. 851/58 in this Court on the 24th November 1958. The plaintiff then started the present action.

It was agreed both by Mr. Edgar and Mr. Thean that the said premises are not protected by the provisions of the Control of Rent Ordinance No. 2 of 1956.

On the above facts the plaintiff prayed for specific performance of the original agreement to grant a monthly tenancy of No. 3, Main Road, Sungei Way dated 12th September 1929.

A preliminary point was taken by Mr. Thean for the defendant who doubted whether the power of attorney granted to the plaintiff in this case in fact authorised him to sue on a matter of this nature on behalf of his principal and with whom the tenancy agreement in respect to the premises was made. He pointed out that the tenancy was made between the attorney's principal and the defendant's predecessor in title and that if the principal did not in fact specifically authorise the attorney to sue on a matter of this nature, that was the end of the matter. I agree with Mr. Thean that a power of attorney must be strictly construed and the general powers contained therein can only be used in respect to the particular powers contained in the document. But on reading the power of attorney as a whole I am satisfied that the particular powers referred to in paragraph 14 read with the general powers

in paragraph 4 give the present plaintiff power to sue on behalf of his principal on matters arising out of the tenancy agreement.

Mr. Edgar based his case on the ground that at no time did the defendant terminate the tenancy. He pointed out that on the authority of *Alagappa Chettiar* v. *Kader & Ors.*[1] that a monthly tenancy is really a tenancy at will which continues until properly determined by the act of the parties or by operation of law. He argued that since the defendant had at no time terminated the tenancy by a formal notice the tenancy existed throughout the period during which the order of the Mentri Besar prohibiting the plaintiff from living on the said premises was in force.

Mr. Thean for the defendant in a full and careful argument endeavoured to persuade me that the effect of the Mentri Besar's order was to render further performance of the tenancy illegal and therefore section 57(2) of the Contract (Malay States) Ordinance, 1950, applied and the contract of tenancy became void. His second point was that in any event the order of the Mentri Besar rendered the performance of the contract impossible and therefore the contract had been frustrated. He cited *Whitehall Court Ltd.* v. *Ettlinger*[2], *Matthey* v. *Curling*[3] in support of his argument and drew the attention of the Court to the fact that in *Matthey's case* it was not laid down that the doctrine of frustration could never apply to a lease and in fact in *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*[4] there is *dicta* both of Lord Simonds at page 229 and Lord Wright at p. 241 in support of the argument that the doctrine could in fact apply to a lease. Mr. Thean argued quite correctly that in England a lease creates an estate in land whereas in this country it does not and therefore he argued that the English cases lend support to his argument because a tenancy or lease in this country should be treated in the same way as an ordinary contract. With great respect I do not think that section 57(2) of the Contract Ordinance or the doctrine of frustration apply in this case at all. The grant of a lease for a term of years of immovable property does not necessarily mean that the lessee intends to reside on the property. Indeed in the case of *London and Northern Estates Co.* v. *Schlesinger*[5] which is a case somewhat similar to the present one it was held that it was not the basis of a contract of tenancy that the defendant should continue to be allowed by law to inhabit the premises the subject matter of the lease and that the order against him under section 18 of the Aliens Restriction (Consolidation) Order 1914 had not the effect of extinguishing his tenancy. In the present case all that the order of the Mentri Besar did was to prevent the tenant in company with other occupants of the property from residing there and there was nothing to stop the defendant from insisting that the plaintiff pay the rent and in my view had she done so the defendant would have been liable. As Tucker J. said in *Pelepah Valley (Johore) Rubber Estates Ltd.* v. *Sungei Besi Mines Ltd.*[6] "Putting aside the question whether or not the doctrine of frustration applies to a mining lease such as this, the first question to be determined is whether the occupation of Johore on 28th January, 1942, was an event that frustrated the contractual relation then subsisting between the parties to the sub-lease. To answer this question it is, I think, necessary to decide whether or not, when the contract was entered into, both parties would of necessity have agreed that in the events that had happened by 28th January, 1942, the contract should be not merely suspended or modified but completely destroyed and both parties automatically discharged."

I think that if such a situation had been considered when the agreement was made on the 12th September 1929 the parties would have not considered that such an order would render the performance of the contract impossible, since if either party so wished he could terminate the contract of tenancy by a month's notice.

I think much of the difficulty in this case has arisen out of faulty pleadings. The plaintiff prays for specific performance of the agreement dated 12th September 1929 which had been fulfilled. It was therefore an executed and not an executory contract. It is an elementary principle of equity that specific performance will only be granted in the discretion of the Court in the case of executory contracts.

Power is given to this Court in its discretion to order the specific performance of certain contracts by virtue of the Specific Relief (Malay States) Ordinance, 1950. Section 11 lays down the conditions under which the discretionary powers are exercisable. In every single case the contract is executory. But even if such a remedy were available, following the case of *J. M. Abdul Kadir* v. *Shaw Bros.*[7], I would not be prepared to grant specific performance of a monthly tenancy.

If the plaintiff has any remedy at all under the Specific Relief Ordinance his remedy is contained either in section 7 or section 8. This present action is not an action for ejectment which according to *Pollock & Mulla* "The Indian Contract & Specific Relief Acts" 8th Edition p. 747 is what is meant by the words "in the manner prescribed by the Code of Civil Procedure". The only other section, therefore that the plaintiff can bring himself is section 8. The prerequisite here is that the tenant must have been dispossessed of the premises without his consent otherwise than by operation of law.

I have some doubt whether the order of the Mentri Besar ordering the tenant to leave the premises pursuant to powers vested in him does not in fact amount to his being dispossessed by operation of law. But my interpretation of the actions of the parties after service of that order dispenses with the need to decide this point. It will be recalled that the defendant in her evidence said that she had no idea where the tenant was. The plaintiff himself was in India. The tenant took no steps to get in touch with the defendant

after the making of the order. The defendant did not claim rent as she did not know where the tenant had moved to. The assumption must irresistably be that the tenant considered the tenancy at an end and had no wish to be held liable for the payment of rent in respect of the premises that he was unable to occupy. A prudent person who wished to ensure that the tenancy would continue would either have paid his rent regularly or would have made some fresh agreement with his landlord to cover the period during which time the order of the Mentri Besar was in force. The conduct of the tenant in not paying his rent and not communicating with his landlord in any way indicates that he intended the tenancy to be terminated to enable himself to escape the liability for rent and it is quite clear that the defendant took this to be so and she took possession of the premises by occupying them herself.

I therefore hold that on the Service of the Order of the Mentri Besar the tenant abandoned the monthly tenancy and that the defendant repossessed herself of her lawful property as soon as she was able to do so on the revocation of the Order of the Mentri Besar because the intention of the tenant (who did not give evidence) in abandoning the tenancy without in any way attempting to communicate with his landlady or her agent clearly indicated that he intended to terminate the tenancy created by the oral agreement dated the 12th September, 1929.

At the time of the issue of the writ in this action there never was any tenancy and the agreement of the 12th September 1929 had been executed. Accordingly the plaintiff fails and the action is dismissed with costs.

Action dismissed.

Solicitors: *Bannon & Bailey; Lee & Thean.*

CHU GEOK KEOW v. CHONG MENG SZE

[A. C. J. (Syed Sheh Barakbah J.) February 14, 1960]

[Alor Star — Civil Appeal No. 6 of 1958]

Chinese Customary Marriage — Secondary wife — Legal requirements of marriage with a tsip — Evidence — Photograph — Adoption of children.

For the legal requirements of a marriage with a *tsip* or a secondary wife the law merely requires a consensual marriage or mutual consent to marry. The requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of a status of a *tsip*.

A photograph is not conc'usive evidence of proof of marriage; and the adoption of children by the parties is not in itself sufficient proof either.

Cases referred to:—

(1) *Re Lee Choon Guan, decd.*, [1935] M.L.J. 78.

(2) *Re Lee Siew Kow, decd.*, [1952] M.L.J. 184.

CIVIL APPEAL.

Lim Ewe Hock for the appellant.

Ong Huck Lim for the respondent.

Cur. Adv. Vult.

Syed Sheh Berakbah J.: This is an appeal by the appellant against the decision of the learned Magistrate dismissing her claim for the maintenance of herself and her child alleging that she is the secondary wife of the respondent.

In his grounds of judgment, the learned Magistrate held the view that in order to prove a secondary marriage it was necessary to prove (a) long cohabitation, (b) an intention to form a permanent union and (c) repute of marriage relying on the case of *Re Lee Choon Guan*[1]. With this view of the Magistrate I am unable to agree having regard to the authority quoted by the learned Counsel for the appellant — *In re Lee Siew Kow*[2], which decided that for the legal requirements of a marriage with a *tsip* or a secondary wife the law merely required a consensual marriage or mutual consent to marry and that the requirements of a ceremony, of a formal contract and of repute of marriage were evidentiary only and not essential to the acquisition of a status of a *tsip*. Therefore in my opinion the Magistrate had misdirected himself on the law and it now remains for me to decide whether from the evidence before the Court the Magistrate was justified in coming to the decision which he did.

The onus no doubt is on the appellant to prove that she is the secondary wife of the respondent. From the facts it is not disputed that the respondent has known the appellant for more than 10 years. Appellant alleges that there was a feast in Penang at her second sister's house although there was no ceremony. About 10 persons attended, relatives and friends. A photograph was also taken; later they adopted two children and afterwards a son was born to them. He used to maintain her and the last allowance she received from him was in October 1954.

Respondent denies that she is his secondary wife. He has never introduced her to his relatives or friends in accordance with Chinese custom. He did not adopt any children and denied that the son was his. He did not even know when he was born.

The witnesses for the appellant are mostly her relatives, and the friends who were called as witnesses merely stated that they heard about the marriage from appellant's mother who is now dead, which is hearsay. It is significant that no friends who attended the party were ever called to give evidence. The report of the birth of the son was made by the appellant and respondent denied that it was his son and knew nothing about the birth. A photograph is not conclusive evidence of proof of marriage and Exhibit P-2 does not appear to me to be that of a married couple. With regard to the adoption of the children, respondent denied it and assuming that they did adopt the children, it is in my opinion not by itself sufficient proof of marriage and although in Exhibit P-3 the words 'husband and wife' are mentioned, to my mind, they are merely intended to induce the parents to part with the